

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

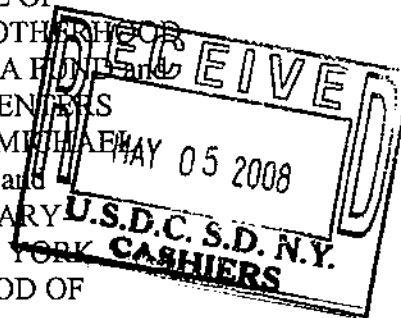
JUDGE HOLWELL

08 CV 42587

THE NEW YORK CITY DISTRICT COUNCIL OF  
CARPENTERS PENSION FUND, NEW YORK CITY  
DISTRICT COUNCIL OF CARPENTERS WELFARE  
FUND, NEW YORK CITY DISTRICT COUNCIL OF  
CARPENTERS VACATION FUND, NEW YORK CITY  
DISTRICT COUNCIL OF CARPENTERS ANNUITY  
FUND, NEW YORK CITY DISTRICT COUNCIL OF  
CARPENTERS APPRENTICESHIP, JOURNEYMAN  
RETRAINING, EDUCATIONAL AND INDUSTRY  
FUND, NEW YORK CITY DISTRICT COUNCIL OF  
CARPENTERS CHARITY FUND, UNITED BROTHERHOOD  
OF CARPENTERS AND JOINERS OF AMERICA FUND, and  
THE NEW YORK CITY AND VICINITY CARPENTERS  
LABOR-MANAGEMENT CORPORATION, by MICHAEL  
J. FORDE, and PAUL O'BRIEN, as TRUSTEES, and  
MICHAEL J. FORDE, as EXECUTIVE SECRETARY  
TREASURER, DISTRICT COUNCIL FOR NEW YORK  
CITY AND VICINITY, UNITED BROTHERHOOD OF  
CARPENTERS AND JOINERS OF AMERICA,

08 CV \_\_\_\_\_

**COMPLAINT**



Plaintiffs,

-against-

NEW WAY GENERAL CONSTRUCTION, INC.,

Defendant.

-----X

Plaintiffs ("Benefit Funds"), by their attorneys O'Dwyer & Bernstein, LLP, for their  
Complaint allege as follows:

**NATURE OF THE CASE**

1. This is an action to confirm and enforce an Arbitrator's Award rendered pursuant  
to a collective bargaining agreement ("Agreement") between The District Council of New York  
City and Vicinity of the United Brotherhood of Carpenters and Joiners of America ("Union") and  
New Way General Construction, Inc. ("Employer").

### **JURISDICTION**

2. This Court has jurisdiction over this proceeding pursuant to section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. §185, sections 502(a)(3)(B)(ii), (d)(1), (e) and (g) of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§1132(a)(3)(B)(ii), (d)(1), (e) and (g), section 515 of ERISA, 29 U.S.C. §1145, and section 9 of the Federal Arbitration Act, 9 U.S.C. §9.

3. Personal jurisdiction is based upon Section 502(e)(2) of ERISA, 29 U.S.C. §1132(e)(2).

### **VENUE**

4. Venue is proper in this district in that Plaintiffs' offices are located in this district.

### **PARTIES**

5. At all times relevant herein the Plaintiffs were jointly administered, multi-employer, Taft-Hartley Benefit Funds administered by trustees designated by a union and by employers, established and maintained pursuant to section 302(c)(5) of the LMRA, 29 U.S.C. §186(c)(5). Plaintiffs Forde and O'Brien are fiduciaries of the Benefit Funds within the meaning of ERISA sections 3(21) and 502, 29 U.S.C. §§1002(21) and 1132.

6. The Benefit Funds are employee benefit plans within the meaning of sections 3(1) and (3) of ERISA, 29 U.S.C. §1002(1) and (3) and are maintained for the purposes of providing health, medical and related welfare benefits, pension and other benefits to eligible participants and beneficiaries on whose behalf they receive contributions from numerous employers pursuant to collective bargaining agreements between the employers and the Union.

7. Upon information and belief defendant is a domestic corporation incorporated under laws of the State of New York with a principal place of business located at 957 Visser

Ave., Schenectady, NY 12306.

8. The defendant is an employer within the meaning of section 3(5) of ERISA, 29 U.S.C. §1002 (5).

**FIRST CLAIM FOR RELIEF**

9. Defendant was bound at all relevant times by a collective bargaining agreement with the Union, which, by its terms, became effective July 1, 2001. Said Agreement provides, inter alia, that the defendant shall furnish its books and payroll records when requested by the Benefit Funds for the purpose of conducting an audit to ensure compliance with required benefit fund contributions and for the submission of disputes to final, binding arbitration.

10. A dispute arose during the period of the Agreement between the parties when the Employer failed to comply with the Benefit Funds' demands to furnish its books and records for the purpose of conducting an audit.

11. Pursuant to the arbitration clause in the Agreement, the dispute was submitted to arbitration to Robert Herzog, the duly designated impartial arbitrator.

12. Thereafter, upon due notice to all parties, the arbitrator duly held a hearing and rendered his award, in writing, dated March 25, 2008 determining said dispute. Upon information and belief, a copy of the award was delivered to the defendant (A copy of the award is annexed hereto as Exhibit "A" and made part hereof).

13. The arbitrator found that defendant had failed to comply with the Agreement as it relates to paying fringe benefit monies and directed it to furnish the Plaintiffs with any and all books and records, for the period of July 1, 2002 through March 25, 2008 including but not limited to, the cash disbursement section of the cash book, general ledger, job location records, daily time records and all certified payrolls.

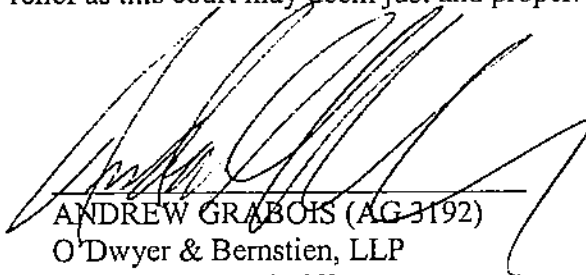
14. The arbitrator also found that defendant was required to pay the funds a sum of \$2,350.00 pursuant to the Agreement, representing costs incurred in the arbitration.

15. The defendant has failed to abide by the award.

WHEREFORE, Plaintiffs demand judgment against defendant as follows:

1. For an order confirming the arbitration award in all respects;
2. For entry of judgment in favor of the Plaintiffs ordering defendant and its officers to make available to the Plaintiffs or authorized representatives any and all books and records deemed necessary to conduct an audit including, but not limited to, the cash disbursement section of the cash book, general ledger, job location records, daily time records and all certified payrolls for the period July 1, 2002 through March 25, 2008.
3. For entry of judgment in favor of the Benefit Funds and against New Way General Construction, Inc. ordering defendant to pay the Benefit Funds a total sum of \$2,350.00 with interest to accrue at the rate of 10% from the date of the award, pursuant to the arbitrator's award.
4. For attorneys' fees and costs of this action;
5. For such other and further relief as this court may deem just and proper.

Dated: New York, New York  
May 5, 2008



ANDREW GRABOIS (AG-3192)  
O'Dwyer & Bernstein, LLP  
Attorneys for Plaintiffs  
52 Duane Street  
New York, NY 10007  
(212) 571-7100

# **EXHIBIT A**

**ORIGINAL**

**OFFICE OF THE IMPARTIAL ARBITRATOR**

-----X  
In The Matter Of The Arbitration

between

New York City District Council of Carpenters  
Pension Fund, New York City District Council of  
Carpenters Welfare Fund, New York City  
District Council of Carpenters Vacation Fund,  
New York City District Council of Carpenters  
Annuity Fund, New York City District Council  
of Carpenters Apprenticeship, Journeyman  
Retraining, Educational and Industry Fund,  
New York City District Council of Carpenters  
Charity Fund, United Brotherhood of Carpenters  
and Joiners of America Fund and The New York  
City and Vicinity Carpenters Labor-Management  
Corporation, by Michael J. Forde and Paul  
O'Brien, as Trustees

**DEFAULT**

**AWARD**

And

Michael J. Forde, as Executive Secretary-  
Treasurer, District Council for New York City  
and Vicinity, United Brotherhood of Carpenters  
and Joiners of America

(Petitioners)

-and-

New Way General Construction, Inc.  
(Employer)

-----X  
BEFORE: Robert Herzog, Esq.

New Way General Construction, Inc. (hereinafter referred to as  
the "Employer") and the United Brotherhood of Carpenters and Joiners  
of America, are parties to Collective Bargaining Agreements, dated  
1997 and thereafter, that are hereinafter referred to as the  
"National Agreements." National Agreements Articles I and II,  
provide:

**The Company agrees to ... comply with the contractual wages, fringe benefits, hours and other working conditions established between the UBCIA affiliates and the employers or recognized agencies in the localities in which the Company does any work within the jurisdiction of the UBCIA.**

**Payment of annuity, pension and/or health and welfare contributions for an employee's work in each locality shall be made to such funds and in such amounts as are identified in the applicable collective bargaining agreement for that locality ....**

The District Council of New York City and Vicinity of the United Brotherhood of Carpenters and Joiners of America is such an affiliate in the New York City and Vicinity area. The Independent Building Construction Agreement, hereinafter referred to as the "Independent Agreement," is the applicable collective bargaining agreement the District Council of New York City and Vicinity of the United Brotherhood of Carpenters and Joiners of America has entered into with employers in the New York City and Vicinity area doing any work within the jurisdiction of the UBCIA. The Independent Agreement sets forth the contractual wages, fringe benefits, hours and other working conditions established between the District Council of New York City and Vicinity of the United Brotherhood of Carpenters and Joiners of America and such employers.

The Independent Agreement provides for arbitration of disputes before the undersigned Arbitrator as Impartial Arbitrator, and for the Employer to pay contributions toward employee benefit funds (hereinafter collectively referred to as the "Funds"). The Petitioners, as beneficiaries of the Independent Agreement, have standing before the Arbitrator. In accordance therewith, the Petitioners, by a January 4, 2008 Notice of Intention to Arbitrate,

demanded arbitration. The Petitioners alleged the Employer failed to permit the Funds to conduct an audit of its books and records for the period of July 1, 2002 through to date to determine whether it is in compliance with its obligation to contribute to the Funds. A Notice of Hearing dated January 18, 2008 advised the Employer and the Petitioners that the arbitration hearing was scheduled for February 19, 2008.

The Notice of Hearing was sent to the Employer by regular and certified mail. The regular mail copy of the Notice of Hearing was returned to sender marked "refused." The certified mail copy of the Notice of Hearing was not returned as undeliverable, but was returned marked "unclaimed." United States Postal Service records indicate that notice of certified mail was left with the Employer on January 25, 2008 at 1:51 pm. The Employer failed to heed the notice and the postal service declared the envelope to be unclaimed and so marked the envelope on February 11, 2008. The Employer is deemed to have received the Notice of Hearing based on the Employer's voluntary refusal of the regular mail copy and the Employer's voluntary act of not claiming the certified mail copy.

On February 19, 2008, at the place and time designated by the aforesaid Notice of Hearing, Steven Kasarda, Esq. appeared on behalf of the Petitioners. No appearance on behalf of the Employer was made. Also, no written, mutually agreed upon waiver by the parties



to adjourn the proceeding, as required by the Independent Agreement, was presented. The arbitration proceeded as a Default Hearing. Full opportunity was afforded the parties present to be heard, to offer evidence, and to examine witnesses. The Petitioners thereupon presented their proofs to the Arbitrator.

The uncontroverted testimony and evidence established that:

- During the July 1, 2002 to date period, the Employer was bound to Independent Agreements with the District Council of New York City and Vicinity of the United Brotherhood of Carpenters and Joiners of America.
- The Independent Agreements obligated the Employer to make certain payments to Fringe Benefit Trust Funds on behalf of all its carpenter employees pursuant to schedules set forth in the Independent Agreements.
- The Independent Agreements authorized the Funds to conduct an audit of the Employer's books and records in order to verify that all the required contributions were made to each of the aforesaid Fringe Benefit Trust Funds maintained by the Funds.
- In accordance with this auditing provision, an accountant, employed by the Funds, sought to conduct an audit of the Employer's books and records. In violation of this auditing provision, the Employer did not consent to an audit of the Employer's books and records.

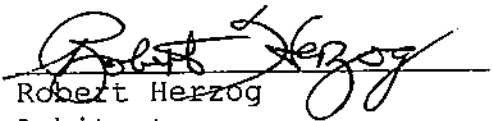
AWARD

Based upon the substantial and credible evidence of the case as a whole:

1. New Way General Construction, Inc. is in violation of the terms of the Independent Agreements;
2. New Way General Construction, Inc. is ordered to permit and facilitate the Funds conducting an audit of its books and records for the period of July 1, 2002 through to date to determine whether it is in compliance with its obligations to contribute to the Funds;
3. New Way General Construction, Inc. shall pay to the Funds forthwith the Petitioners' counsel's fees, the undersigned Arbitrator's fee, and all associated court costs in the following amounts:

Court Costs	\$ 350.00
Attorney's Fee	1,500.00
Arbitrator's Fee	500.00
TOTAL	\$2,350.00

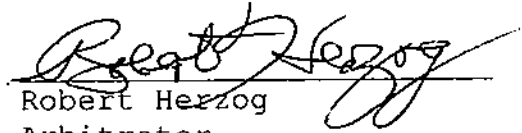
4. New Way General Construction, Inc. shall pay to the District Council Carpenters Benefit Funds the aggregate amount of two thousand three hundred fifty dollars (\$2,350.00) with interest to accrue at the rate of 10% from the date of this Award.

  
Robert Herzog  
Arbitrator

Dated: March 25, 2008

State of New York )  
County of Rockland )

I, Robert Herzog, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is my Award.

  
Robert Herzog  
Arbitrator

Dated: March 25, 2008

To: New Way General Construction, Inc.  
Attn: Mr. Mark Maslanka  
957 Visher Avenue  
Schenectady, New York 12306

New Way General Construction, Inc.  
Attn: Mr. Mark Maslanka  
1525 California Avenue  
Schenectady, New York 12303

Steven Kasarda, Esq.  
New York City District Council Carpenters Benefit Funds  
395 Hudson Street  
New York, New York 10014